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December 16, 2019

Via Legal Messenger

Mr. Barry Berezowsky,
Community Development Director
City of Sequim
152 W. Cedar Street
Sequim, WA 98382

Re: Reconsideration of December 9, 2019 City Council Decision Denying Lavender Meadows Preliminary Major Binding Site Plan, File No. BSP 19-002

Dear Mr. Berezowsky:

We represent The JWJ Group LLC, the Applicant for the Lavender Meadows Preliminary Major Binding Site Plan. On its behalf, pursuant to Sequim Municipal Code Section 20.01.210, we include herewith a Request for Reconsideration of the City Council's Decision of December 9, 2019 denying the Lavender Meadows Preliminary Major Binding Site Plan.

Also included is a check for the filing fee in the amount of $600.00.

Sincerely,

Davis Wright Tremaine LLP

Charles Maduell

Encs.
cc: John Johnson, JWJ Group, LLC

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BEFORE THE SEQUIM CITY COUNCIL

In re: Lavender Meadows Preliminary Major Binding Site Plan City Council Decision of December 9, 2019	File No. BSP 19-002 NOTICE AND STATEMENT OF REQUEST FOR RECONSIDERATION

I. PRELIMINARY MATTERS.

A. Identification of Decision and Reconsideration Fee.

Pursuant to the Sequim Municipal Code (the "SMC," or "Code") at § 20.01.210, The JWJ Group, LLC (the "Petitioner") requests reconsideration by the Sequim City Council (the "Council") of the Council's decision as issued orally on December 9, 2019 and delivered by written notice (the "Written Decision," and together with the oral announcement, the "Decision") on December 13, 2019. In the Decision, the Council denied Petitioner's application for a 217-unit Preliminary Major Binding Site Plan called Lavender Meadows (the "Project"), as submitted under File No. BSP 19-002 (the

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"Application"). The reconsideration fee is $600, which has been delivered attached to this request in the form of a check. A copy of the Written Decision is also attached.

B. Name, Address and Interests of Petitioner.

The Petitioner's interest in this matter is its status as applicant, proponent and sponsor of the Application and the Project proposed thereunder. The Petitioner is experiencing significant and ongoing monetary damages that are directly and proximately caused by the Council's arbitrary, capricious and unlawful Decision.

The Petitioner's name and address are as follows:

The JWJ Group, LLC
Attn. John W. Johnson
3599 NW Carlton Street, #201
Silverdale WA 98383

The name and address of Petitioner's attorneys are as follows:

Davis Wright Tremaine LLP
Attn: Charles Maduell and Josh Friedmann
1201 Third Ave, Suite 2200
Seattle, WA 98101
(206) 757-8093
chuckmaduell@dwt.com
joshfriedmann@dwt.com

II. REASONING AND BASIS FOR RECONSIDERATION

A. Introduction.

The only apparent basis for the Council's Decision is its conclusory and unsupported finding that the Project "does not serve the public interest." Written Decision at 2. The Council's denial on this basis violates well-established and unambiguous Washington law, and is an arbitrary, capricious, and unlawful action in excess of Council authority.

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Where a municipal body wishes to adjudicate a quasi-judicial permitting decision like this one, the Washington Supreme Court holds with unusual directness that its justices "require, founded upon and supported by the record, that findings of fact be made and conclusions or reasons based thereon be given for the action taken by the deciding entity (in this case, the city council)." *Parkridge v. City of Seattle*, 89 Wn.2d 454, 464, 573 P.2d 359 (1978) (*en banc.*). Here, the Council's Decision does not satisfy that clear direction, and therefore cannot and does not serve as a lawful basis for denying a project that otherwise demonstrably meets all Code requirements.

Under SMC 20.01.210, reconsideration is granted "when an obvious legal error has occurred or a material factual issue has been overlooked that would change the previous decision." *Id.* That standard is satisfied for the reasons and on the basis described herein.

B. The Council's Findings and Conclusions Are Inadequate *Per Se*.

First, the Council's Decision includes no meaningful findings of fact, and under longstanding Washington law requires reversal on that basis alone.

As set forth in the Written Decision, the Council's first 'finding' is simply a recitation of the matter's procedural posture. *See* Written Decision at 1. While helpful as background, the statement provides no insight into the basis for the Council's Decision.

The Council's second 'finding' is actually a conclusion of law, holding that the Application failed to satisfy the codified "public interest" criterion for binding site plan approvals, but without any guidance as to *why* that might be the case. *Id.* at 2. Unlike the first 'finding,' the second finding purports to support a denial. However, it provides no illumination into how the Council reached its Decision. The statement is a conclusion. *Cf. Maranatha Min., Inc. v. Pierce Cnty.*, 59 Wn. App. 795, 802, 801 P.2d 985 (1990) ("The

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general statement in the Council's resolution denying the permit . . . is not a finding, but a conclusion.") (holding it "improper to deny [a] permit to an applicant who, through the application process, has demonstrated a willingness to mitigate any and every legitimate problem").

The only conclusion in the written Decision, Conclusion #1, adds no clarification. Written Decision at 2. It merely states in conclusory fashion that the Project "failed to meet all the Binding Site design regulation requirements of SMC 17.24.090" without indicating which, if any, of the requirements have not been met or how. *Id.* at 2. Presumably it is intended to refer to the "public interest" requirement of SMC 17.24.090(J), but there is no way to know this given the lack of supportive findings of fact.

Because the Decision provides no meaningful findings of fact, it leaves both the Petitioner and the public unable to know or understand the basis on which it was decided. Under Washington law, this procedural posture requires that the Decision be reconsidered and that Application approved. *See Nagatani Bros., Inc. v. Skagit Cnty. Bd. of Comm'rs*, 108 Wn.2d 477, 482, 739 P.2d 696, 699 (1987) (*en banc*) ("We emphasize the necessity of administrative bodies following the applicable statutes and the applicable written regulations and policies. An adequate record, including intelligible findings based upon the evidence presented to the decision makers, must be made to allow required judicial review."); *Maranatha Mining*, 59 Wn. App. at 805 ("Given the posture of this case, it would be pointless to remand for further Council proceedings, [as the] findings and the controlling law will support nothing other than issuance of the permit. Accordingly, we reverse and remand with instructions to grant the permit . . .")

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In the analogous case of *Maranatha Mining*, the court explained that the Pierce County Council's failure to provide findings of fact "made inevitable [the court's] decision to require issuance of the permit." *Id.* at 800. Here, as in that case, because no findings of fact are provided, "the Council's decision was beyond being clearly erroneous; it was entirely without legal support and therefore erroneous as a matter of law." *Id.* at 803. Where a permit denial is supported only by "generalized complaints from displeased citizens," and not by any findings of fact, it is a "textbook example of arbitrary and capricious action: without consideration and in disregard of the facts." *Id.* at 804 (citing *State ex rel. Myhre v. Spokane,* 70 Wn.2d 207, 210, 422 P.2d 790 (1967)).

In instances like this, where no meaningful findings of fact are issued, the Council's Decision loses the presumption of reasonableness that it would usually enjoy. In fact, the burden is now *on the Council* to show that its denial was not arbitrary or capricious. *See State ex rel. Standard Mining & Dev. Corp. v. City of Auburn*, 82 Wn.2d 321, 328 n.3, 510 P.2d 647 (1973) (*en banc*), *quoted with approval in Pentagram Corp. v. City of Seattle*, 28 Wn. App. 219, 228, 622 P.2d 892 (1981); *see also Harris v. Hornbaker*, 98 Wn.2d 650, 664, 658 P.2d 1219 (1983) (Utter, J., concurring) (listing findings of fact among the procedural protections that are a vital component of Washington's appearance of fairness doctrine). The Council has not and cannot meet that burden. On this basis alone the denial must be reversed.

C. Bare References to "Public Interest" Cannot Support a Denial.

Even if the Council's Decision could somehow survive without a basis in factual findings—and it cannot—the Council's bare references to the "public interest" cannot serve as the sole legal basis for the Decision.

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The Written Decision's sole critique of the Project is that it "failed to serve the public interest." *Id.* at 2. Certainly, the Code does provide the Council with "substantial discretion" in rendering Type C-2 decisions, and finds "broad public interest" in the binding site plan approval process. SMC 20.01.020(W). But Washington law holds that even where "public use and interest" or "public health, safety, and general welfare" are at play, the Council's discretion is not unlimited. *See Norco Const., Inc. v. King Cnty.*, 97 Wn.2d 680, 688, 649 P.2d 103 (1982) (*en banc*). During the Council's public deliberation, as recorded on December 9, 2019 (the "Deliberation")[1] Sequim city attorney Kristina Nelson-Gross (the "City Attorney") correctly cautioned and advised the Council of the applicable rule: When the Council wishes to act in its quasi-judicial capacity, its discretion is limited by "the codes in effect at the time." Deliberation at 1:43:01, *repeated at* 1:49:52 (advice of City Attorney); *see also Norco Const.*, 97 Wn.2d at 688 (holding council's "discretion limited by the procedural requirements of the statute [and] by the land use restrictions that existed at the time").

As asked by Washington's Supreme Court in the case of *Norco Construction*, if the Council may dictate a new or revised "public interest" standard for each permit evaluation,

> how are developers to intelligently go about conforming [to local] requirements? Why bother adopting [a written code] if it may be given the full force of law via the Council's exercise of discretion?

Id., 97 Wn.2d at 688. With this reasoning in mind, Washington law prohibits council denial of a subdivision or binding site plan application on grounds of public use or interest alone, where all other codified requirements are indisputably satisfied. The Court in *Norco Construction* explained that

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[1] An audio recording of the Deliberation was available as of December 15, 2019 at

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> to interpret [a "public use" criterion] as conferring unlimited discretion upon the Council would make the other sections of the platting statute meaningless and place plat applicants in the untenable position of having no basis for determining how they could comply with the law.

Norco Const., 97 Wn.2d at 688, *quoted in Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn. App. 633, 651 (2010) ("Because the proposed subdivision meets the requirements of the [local code], the City lacked the authority to deny the proposal . . . ."). The appeals court went further still in *Carlson v. Town of Beaux Arts Village,* 41 Wn. App. 402, 704 P.2d 663 (1985), finding a town's subdivision denial to be arbitrary and capricious where, as here, all applicable ordinances and standards had been demonstrably satisfied.

The court has been clear in each of these cases: Councilmembers considering permits in their quasi-judicial capacity may not use code statements concerning "public interest" to shoehorn new, uncodified approval requirements into their decision. Unfortunately, the Deliberation suggests that this is exactly what the Council did here:

> I submit that each City Councilmember needs to make a decision as to whether [SMC] 17.24.090(J) is satisfied. [Subsection] (J) says, 'the public interest will be served by the proposal.' . . . I'm not at all convinced that the public interest will be served by the fact that 217 people are going to be at the mercy of the landlord."

See Deliberation (statement by Councilmember) at 2:00:30; *see also Norco Const.,* 97 Wn.2d at 688 (holding "public use and interest" could not be used to apply stricter density standards than provided by statute); *Beaux Arts Vill.*, 41 Wn. App. at 408 (holding "best interests of the Town's Citizens" could not be used to prohibit subdivision based on irregularly shaped lot); *Friends of Cedar Park* (rejecting attempt to overturn plat approval

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https://sequim-wa.granicus.com/MediaPlayer.php?view_id=1&clip_id=297.

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based in purported failures of "public use and interest" where proposal otherwise complied with law in all respects).

Per the advice of the City's planning professionals during the Council's deliberation, the Council must enforce the Code as written. "[O]therwise we are just going to be pulling words out of the air." Deliberation at 1:48:00 (statement by City professional staff). Because the Petitioner "complied with all applicable enacted ordinances in submitting their application," the Council's Decision places the Sequim community in the unenviable position "of having no basis for determining how they [can] comply with the law." *Beaux Arts Vill.*, 41 Wn. App. at 408. Therefore, in addition to being legally erroneous, the Decision is arbitrary and capricious. *See id.*; *quoted with approval in Friends of Cedar Park*, 156 Wn. App. at 649.

D. The Substantive Concerns Raised in Deliberation Were Not a Legal Basis for Denial.

As discussed above, the Council has with its opaque Written Decision stated no findings of fact nor any legal basis upon which the permit can be denied. Either of those deficiencies would by itself be sufficient to require reversal. However, Councilmembers during their Deliberation did make some statements suggesting that the Decision may have been based in concerns regarding (i) a purported ban on private roads, and (ii) speculative landlord-tenant issues that might someday arise within the Project.

Without findings of fact or conclusions of law, the Petitioner and the public have no way to know to what extent—if any—those concerns informed the Decision. But to any extent that the Council's Decision *was* based in either of those concerns, the Decision was legally erroneous. Neither the public/private road issue nor the tenant-protection issue discussed by the Council is a legal basis for Denial.

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i. The Code Requires Private Streets.

The Decision was legally erroneous to any extent that it was based on a purported conflict among Code provisions governing private streets. Although the Council during its Deliberation observed that two provisions conflict with each other, it failed to note that the Code's general prohibition on private streets, codified at SMC 17.32.090, "shall be subordinate" to the prescriptive standard in the zoning code that explicitly requires private roads within manufactured home parks, at SMC 18.62.040. Further, by disregarding the explicit, reasoned and correct advice and analyses of the City Attorney and Sequim's professional planning staff, the Council elevated this error of law to arbitrary and capricious decision-making, and action taken without regard to surrounding circumstances.

ii. The Council Impermissibly Considered Landlord-Tenant Matters.

Similarly, the Decision was erroneous to any extent that it was based on the Council's discussion of tenant-protection matters during its Deliberation. In that discussion, Councilmembers specifically raised concerns that future residents of the Project "won't have any control, really, over their rent" and would thus be "at the mercy of the landlord." Deliberation at 2:00:22 and 2:01:05 (statements of Councilmember). The Council does not have authority to deny the application on these bases. To any extent that the Council's decision was based in landlord-tenant matters, the Decision was obvious legal error, as well as arbitrary and capricious decision-making.

Under state law, the Council is expressly preempted from any efforts to protect future tenant "control . . . over their rent." *Id.* at 2:00:22. Washington's legislature has expressly stated that "the imposition of controls on rent is of statewide significance [and no] town of any class may enact, maintain or enforce ordinances or other provisions which

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regulate the amount of rent to be charged. . . ." RCW 35.21.830 (excepting public-private partnerships). Accordingly, the Council may not maintain or enforce its ordinances in any way aimed at regulating rents charged in its jurisdiction.

Of course, *even if* the Council's landlord-tenant reasoning was in some way not preempted by state law—and the Council provides no evidence for such an argument—the Code contains no basis for denial of the Application on renter-protection grounds. As discussed in *II.C*, supra, where no such codified rule exists, the Council may not use a "public use" criterion to bootstrap a new renter-protection criterion into its approval decision. As the City Attorney advised the Council, the correct legal forum for implementing tenant protections is through its legislative and other policymaking powers – not on a permit-by-permit basis when it sits in its quasi-judicial capacity. Deliberation at 2:06:09 (advice of City Attorney).

E. The Council Underscored its Arbitrary and Capricious Decision-Making By Ignoring the Facts of the Record and the Advice of the City Attorney.

The Decision is arbitrary and capricious for its failure to enter adequate findings of fact, its naked deference to "public interest" over any facts actually found in the record, and to any extent that its decision is based on renter-protection standards not described in the Code. The arbitrary and capricious nature of the Council's action, however, is further underscored by the Council's willful disregard for the reasoned legal advice of its City Attorney and Planning staff. *See Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 959, 954 P.2d 250 (1998) (*en banc*).

In the case of *Mission Springs*, Washington's Supreme Court examined a situation in which the Spokane City Council,

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> contrary to the advice of its own city attorney, deprived the permit applicant of that process lawfully due by [withholding] a permit for reasons extraneous to ordinance, or lawful, criteria.

Id. at 972. The Court found, in such circumstances, that the petitioner was not only entitled to a remand, appellate costs, and attorney fees under both RCW 64.40 and 42 USC 1983, but that council members could be held personally liable for money damages caused by the delay. *See id.* at 972; 969–970.

In *Mission Springs*, Spokane's city attorney had advised the city council that "when a property owner comes forward with a request for a building permit, he [or she] is entitled to have his [or her] project considered *under the rules that are in place at the time* . . . ." *Id.* at 956 (emphasis provided). Here, the City Attorney similarly advised Councilmembers of their legal "obligation to implement [the Code's] standards and approve applications . . . *according to our standards that are in place at the time.*" Deliberation at 1:47:12 (emphasis provided). Despite the Council's dismissal of the City Attorney's advice, she persisted, noting the Council's obligation to "review the application in light of the ordinances before it," because "that is the standard." *Id.* at 2:06:29. The parallels between this case and the facts of *Mission Springs* are striking. They are further indication that the Decision was arbitrary, capricious and unlawful, and that reversal is required.

F. Council Improperly Introduced and Relied on New Evidence.

Finally, the Council added further impurities into its adjudication by introducing new evidence into the Deliberation after the record had been closed. Such action deprived the Petitioner of meaningful opportunity to rebut, cross-examine, or otherwise respond to Councilmembers' testimony. The Petitioner is confident that the Council suffered from a

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momentary lapse in judgment to any extent that the Decision was based in one Councilmember's memory that he "had a buddy," or in another Councilmember's recollection of decades-old hearsay evidence. *See* Deliberation at 2:04:58; 1:42:40; 1:52:53 (remarks of Councilmembers). These statements all occurred after the City Attorney had already attempted to advise the Council against the introduction of such testimony. Deliberation at 1:45:25 (advice of City Attorney) ("[A]s a reminder, the record has been closed on this, [and] we want to be cautious about interpreting new things into the record."). In this instance too, her advice was correct. Under state law, the Council is permitted "no more than one open record hearing" on this matter. RCW 36.70B.050.

> In similar circumstances, the Washington Supreme Court has explicitly question[ed] the propriety of individual . . . members putting into the record, after testimony at the public hearing is closed but before the decision is made, their personal knowledge about potential adverse impacts and supposedly comparable uses.

Nagatani Bros., 108 Wn.2d at 482 ("Individual members should not become witnesses as happened here.") (also emphasizing "the necessity of administrative bodies following the applicable statutes" in the subdivision context).

As the court held in *Nagatani Bros.*, Councilmembers must "act upon facts presented pursuant to the statute and on the record." *Id.* As in *Nagatani Brothers*, this Decision must be reversed and the Application approved.

G. Conclusion.

During the Council's Deliberation, the City Attorney pointed out that the Council has robust powers to protect renters "in the policy realm," through its legislative and

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regulatory powers. Deliberation at 2:06:09 (advice of City Attorney).[2] However, as she noted, the current Application Decision is a quasi-juridical context, not a policymaking context. As "said many times throughout this process" by the City Attorney, "the Council's obligation is to review the application in light of the ordinances before it." Deliberation at 2:06:20 (advice of City Attorney).

The record in this matter shows that not only was the Council's Decision arbitrary, capricious, unlawful and in excess of lawful authority, but that the Council reasonably should have known of those issues, based on the consistent and repeated warnings of its City Attorney. *See* Deliberation at 1:49:42 (advice of City Attorney) ("As Council knows, we can't enforce . . . based on what we want the Code to say. That's the policy function. That's the legislative function."); *cf.* RCW 64.40.020; *Church of Divine Earth v. City of Tacoma,* 194 Wn.2d 132, 137 (2019) (damages available under RCW 64.40.020 where a plaintiff can establish either actual or constructive knowledge of unlawful decision-making).

[2] In fact, Washington's Supreme Court less than one month ago demonstrated that city councils are empowered to dare greatly in efforts to protect tenants. In a pair of remarkable cases, the Court examined a pair of novel and aggressive pro-renter protections recently enacted by the Seattle City Council. *See Chong Yim et al. v. City of Seattle*, No. 95813-1 (Wash. Nov. 14, 2019); *Chong Yim v. City of Seattle*, No. 96817-9 (Wash. Nov. 14, 2019). Sequim need not adopt the measures being tested in Seattle or even elsewhere on the Olympic Peninsula; the Council may advance any number of new policy ideas to help their constituents and their neighbors. They may not, however, apply such policy ideas *ad hoc* in their quasi-judicial capacity.

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The Petitioner is experiencing significant and ongoing monetary damages as a result of the Council's arbitrary, capricious and unlawful decision. For the reasons set forth herein, the Petitioner respectfully requests that the Council reconsider the Decision and approve the Application as recommended by the Planning Commission under SMC 20.01.100(J)(1).

DATED this 16th day of December, 2019.

Davis Wright Tremaine LLP
Attorneys for Petitioner

Josh Friedmann
For Charles Maduell

By _____
Charles E. Maduell
WSBA #15491

Joshua E. Friedmann
WSBA #52946

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CITY OF SEQUIM

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DECISION & ORDER
CITY OF SEQUIM CITY COUNCIL
FOR
LAVENDER MEADOWS PRELIMINARY MAJOR BINDING SITE PLAN
DECEMBER 9, 2019
BSP 19-002

SUMMARY OF DECISION: The City Council issued a decision to **DENY** the Lavender Meadows Major Binding Site Plan on December 9, 2019.

PROPERTY OWNER/APPLICANT: Mary Booth FLP, P.O. Box 622, Carlsborg, WA 98324

PROJECT LEAD: Levi Holmes, The JWJ Group, 3599 NW Carlton St., Suite 201, Silverdale, WA 98383.

PLANNER: Tim Woolett, Senior Planner

PROJECT DESCRIPTION: A proposed preliminary Major Binding Site Plan application to develop a 217-unit manufactured home park in three phases on approximately 38.3 acres of "Single Family Residential" (R 4-8) zoned property. As proposed, Phase 1 will be 82 units, Phase 2 will be 71 units, and Phase 3 will be 64 units. The proposal includes an internal private road system built to adopted city road standards, with one point of access to Port Williams Road and two points of access to N. Sequim Avenue.

PROPERTY LOCATION: The 38.3-acre subject property is currently configured as two lots located adjacent to the south side of Port Williams Road and east side of N. Sequim Avenue, described as Parcel A and Parcel B of Volume 68, Page 61 of Surveys, Clallam County Auditor's File No. 2009-1239079; identified as Assessor's Parcel Nos. 033017-320070, and 033017-330010.

DATE OF HEARING / DECISION: Public Hearing closed November 25, 2019 and the matter was continued to December 9, 2019.

FINDINGS:

Finding #1: The City Council held an open record public hearing on November 25, 2019 where the City Council heard staff's presentation, (including the Planning Commissions recommendation of approval), remarks from the applicant, testimony from the public, and the City Engineer. The City Council closed the public hearing, where it was moved and seconded to continue discussion to the next regularly scheduled city council meeting. The motion carried and the discussion on the matter was scheduled for, and resumed at the December 9 2019 City Council meeting.

Finding #2: After consideration of the matter at its December 9, 2019 meeting, the City Council finds that the Lavender Meadows Major Binding Site Plan failed to serve the public interest.

CONCLUSIONS:

Conclusion #1: The Lavender Meadows Preliminary Major Binding Site Plan failed to meet all the Binding Site Plan design regulation requirements of SMC 17.24.090; **THEREFORE**,

DECISION & ORDER

The application for the Lavender Meadows Preliminary Major Binding Site Plan (BSP 19-002) is hereby **DENIED.**

SO ORDERED, this 9th day of December, 2019.

Dennis Smith, Mayor

Attest:

Sara McMillon, City Clerk

Approved as to form:

Kristina Nelson-Gross, City Attorney

DATE	12-13-19				CHECK NUMBER	444769
DATE	INVOICE NO.	VOUCHER ID	INVOICE AMOUNT	NET AMOUNT	REMARKS	
12-13-19	FRIEJ191213	1517388	600.00	600.00	Re: Administrative Appeal Fee	
				TOTAL		600.00

DAVIS WRIGHT TREMAINE LLP
920 FIFTH AVENUE
SUITE 3300
SEATTLE, WA 98104-1610

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DAVIS WRIGHT TREMAINE LLP

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Authorized Signature

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